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No. 87-1575

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON**

The State of Washington, answering on behalf of itself and Skagit County, asks this Court to deny The Orion Corporation's Petition for Certiorari. The State contends that the facts in this case and the law of the State of Washington remain, after these six years of litigation, unsettled and that this Court, accordingly, should be loathe to interfere with the state proceedings. On the contrary, the State Court has settled the facts and law by issuing final decisions on federal questions before it. If the Court grants the State's request,

* The Orion Corporation has no parent or subsidiaries. Its only affiliate is the Padilla Bay Associates.

** Because the State requested and received additional time to file its responsive brief, only a draft of the State's brief was available to Orion when Orion prepared this reply brief.

nothing can be served below but further economic mischief and unjust delay.[1]

The settled law and facts include the following:

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[1] (a) For example, the State indicates that, of the 9,100 acres Orion owns or controls, 225 acres are held subject to a reversionary clause requiring that the lands be used for oystering. The State's point here is unclear. First, if Washington had had a public trust doctrine, such clauses would have been superfluous. Second, when Orion was acquiring its tidelands, the State was selling these reversionary rights. Had Washington had a public trust doctrine, the State could not have sold such rights. (In 1968, the State appraised its reversionary rights in these 225 acres at $221 per acre and offered to sell the rights to Orion at that price. The State, in 1968, valued even the reversionary rights at far greater than the amount it offered Orion in 1980 for the entire fee under its "willing seller" concept. Orion rejected this State attempt to avoid paying just compensation.)

(b) The State also points out, without noting its relevance, that Orion never wholly completed the "nightmarish" task of assembling the hundreds of tracts in Padilla Bay before the State imposed its moratorium. It did, however, assemble 9,100 acres, resulting in some large blocks of property by 1969. Had the State not interfered, Orion would have acquired more acres. Orion certainly acquired more acres lawfully than the State managed to acquire, with its unlawful "willing seller" approach, for the Sanctuary.

(c) Similarly, the State complains that Orion never applied for a Corps of Engineers permit. This issue, too, has been settled. First, the moratorium was imposed before Orion had reached the permit stage for its project. Second, as the State Court found in *Orion Corp.* v. *State*, 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("*Orion I*"), the Corps would have denied a permit after 1969 because it would have, by regulation, deferred to the State. App. B-22.

(d) Finally, the State complains that, in the 25 years since Orion started acquiring its property, Orion has not applied for any permit. First, the State froze the property before Orion reached the permit application stage. State officials, including the director of the State Department of Ecology, have so recognized. Second, the State Court has twice validated Orion's opinion that applying for a permit would have been, in view of state regulations and the State's "conscious policy choice" to preserve Padilla Bay in its natural state, a vain and futile act. Again, however, the State's attempt to unsettle the record should not earn it more years of delay.

— The State of Washington sold state tidelands so they would be developed and put to useful purposes. *E.g., State* v. *Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913). The State of Washington conveyed these tidelands into absolute fee ownership. *Puget Mill Co.* v. *State*, 93 Wash. 128, 134-36, 160 P. 310, 313 (1916). "Orion's property . . . had originally been sold as unzoned tidelands for commercial development." *Orion Corp.* v. *State*, 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("*Orion I*"), App. B-19.

— The State of Washington, as a "settled policy," promoted reclamation and development of private tidelands. *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 776, 505 P.2d 457, 460 (1973); *Boyer* v. *State*, 19 Wash. 2d 134, 140-42, 142 P.2d 250, 254 (1943). The State Court upheld the right to reclaim Padilla Bay — and other rural tidelands — through the use of the State diking and reclamation statute. *Jones* v. *Hammer*, 143 Wash. 525, 530-31, 255 P. 955, 958 (1927). When Orion began acquiring its tidelands in the early 1960's, the State favored an industrial use of Padilla Bay. *See* Petition at 5. Skagit County zoned a portion of Padilla Bay "industrial." *Id.*

— In 1969, after Orion had completed extensive engineering and feasibility studies, the State imposed a temporary moratorium on tideland development. *Orion Corp.* v. *State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987) ("*Orion II*"), App. A-10. In 1971, the State enacted the Shoreline Management Act, Wash. Rev. Code ch. 90.58 ("SMA"). Thereafter, the State pursued a "conscious policy choice" to preserve Orion's property in its natural state. *Orion I*, App. B-37.

— That "conscious policy choice" came to complete fruition on August 29, 1980, through the establishment, "in perpetuity," of the 11,600-acre Padilla Bay National Estuarine Sanctuary (the "Sanctuary"). The Sanctuary "is the

final and determinative land use program that directly impacts Orion's property." *Orion I*, App. B-23. The State included all of the 9,100 acres owned or controlled by Orion in the Sanctuary, but refused to condemn the property for this "public enterprise." Orion was forced to sue to establish the taking of its property.

— At least since 1980, Orion has been unable to obtain a permit for any economic use of its property. And the State Court has twice so held. *Orion II*, App. A-25; *Orion I*, App. B-44-45.

— In December 1987, the State Court held that Orion, from the outset, had had no substantial rights in its property. Rather, the State, the State Court held for the first time, sold the property subject to a public trust. This public trust grants the public a right to use Orion's property for navigation, fisheries, recreation, and other public needs as modern science is able to identify them. *Orion II*, App. A-43-44. Finally, in espousing its "insulation" doctrine, the Court also held: "[T]he SMA and SCSMMP [State and County shoreline regulations Orion has challenged] qualified as a public health and safety regulation, insulated from characterization as a taking, and thus subject to challenge only under substantive due process." *Id.* at A-91-92.

As the foregoing indicates, the record necessary to address the federal issues is settled.

ARGUMENT

1. THE PUBLIC TRUST DECISION.

The State argues that, because Washington purportedly has inconsistent cases on the public trust, *Orion II* cannot be a sudden departure from precedent. Brief at 24.

Accordingly, the State continues, this Court should not meddle with Washington law.

To support its position, the State ignores, as the State Court did, the controlling authority flatly repudiating a public trust over Washington's tidelands. *E.g., Puget Mill Co.* v. *State*, 93 Wash. 128, 160 P. 310 (1916). It relies, instead, primarily on authority that has been distinguished, discredited, or overruled. For example, the State relies on *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901). As more fully argued in Orion's Petition, however, *New Whatcom* was neither a tideland nor shoreland case nor one addressing navigability, but rather a case involving riparian rights in a small, non-navigable stream. The *New Whatcom* court itself distinguished *New Whatcom* from tideland cases. *See* Petition at 20.

The State also points to *Dawson* v. *McMillan*, 34 Wash. 269, 75 P. 807 (1904). In *Dawson*, the State Court refused to allow the blocking of a channel that had been used for commercial navigation. The State Court later distinguished the case, questioning even whether the plaintiff was really a tideland owner and noting that "the plaintiff was not in fact given the right to cross the tidelands of the defendant to reach the navigable channel, but only to traverse the channel itself." *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 780, 505 P.2d 457 (1973).

These and other cases were criticized by both the State Court and this Court. "[T]hese cases must be regarded as incorrectly stating the principle involved rather than as authority." *Lownsdale* v. *Grays Harbor Boom Co.*, 54 Wash. 542, 551, 103 P. 833 (1909); *accord*, *Port of Seattle* v. *Oregon & Washington Railroad Co.*, 255 U.S. 56, 64 n.4 (1921). At least by 1915, the State Court could write:

> *Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form* as these deeds are, upon which are rested the titles of the plaintiffs. *The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands.*

Puget Mill Co. v. *State*, 93 Wash. 128, 134-35, 160 P. 310, 313 (1916), emphasis by Court in *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 775-76, 505 P.2d 457, 461 (1973).

The State seeks to escape liability for the public trust servitude now granted the public over Orion's lands on the basis that the State Court may have many decades ago strayed from settled authority. The State should heed this elementary principle of life and law: Two wrongs do not make a right.[2]

2. FINALITY OF THE STATE COURT'S DECISIONS.

This Court may review final decisions of a state's highest court "where any title, right, privilege or immunity

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[2] The State contends that "Orion points to no cases, because there are none, in which the State of Washington has attempted to relinquish its ability and obligation to protect the public rights of navigation and fishery in waters seaward of the inner harbor lines established in urban areas." Brief at 18-19. To the extent that this statement is comprehensible, it is both remarkable and wrong. *See generally* Petition at 12-21. The State for years promoted the diking and reclamation of tidelands, including rural tidelands. *E.g.*, *Jones* v. *Hammer*, 143 Wash. 525, 255 P. 955 (1927) (diking and reclamation statutes [like other tideland improvement statutes] are applicable to rural tidelands, here Padilla Bay).

is . . . claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(3). The decisions in *Orion II*, which deny Orion its constitutional property rights, are "final" within the meaning of Title 28 U.S.C. § 1257.

This Court has in certain circumstances treated a state decision on a federal issue "as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975), and cases cited therein. One circumstance in which this Court has done so is when "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. *See, e.g., New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U.S. 362 (1914); *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287 (1891). In this situation, "immediate rather than delayed review [may] be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945)).

For example, in *New York* v. *Cathedral Academy*, this Court reviewed a state decision upholding the constitutionality of a statute that authorized reimbursement to nonpublic schools for state-mandated recordkeeping and testing services. Although the case was remanded for determination of the amount due the plaintiff, this Court concluded that:

> [N]o possible developments on remand could sufficiently minimize the risk of future constitutional

> harm. . . . Since further proceedings cannot remove or otherwise affect this threshold federal issue, the Court of Appeals' decision, is final for purposes of review in this Court.

434 U.S. at 128 n.4.

In the case at bar, the State Court has finally determined that (1) Orion's property is subject to a public trust, (2) the State, in establishing and operating the Sanctuary, did not take Orion's property by invasion, (3) the state shoreline regulations are insulated from Orion's regulatory taking claim, and (4) the State will not recognize a cause of action for oppressive pre-acquisition conduct. As in the cases cited above, developments on remand will not affect these federal constitutional issues. Even if the trial court determines that a regulatory taking has occurred,[3] and awards compensation on this basis, these federal issues "will survive and require decision."

Moreover, the issues on remand cannot be decided correctly prior to final disposition of the federal constitutional issues by this Court. The trial court's determination whether a taking has occurred and, if so, of the amount of compensation due to Orion as a result of the taking is directly dependent on this Court's determinations whether the public trust doctrine applies, whether the State took Orion's property by invasion, and whether the State is subject to a regulatory taking claim.

Thus, if Orion must await the completion of the additional state court proceedings before seeking review by this Court, and this Court subsequently reverses the decisions in

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[3] How a regulatory taking could have occurred under the reasoning of *Orion II* is unclear. The State Court has ruled that the shoreline regulations are "insulated" from a takings challenge, and may be attacked only on substantive due process grounds. App. A-91-92.

Orion II, the lower court proceedings will all be for naught. All decisions made by the lower court will have to be reconsidered in further state proceedings. Accordingly, the delay of review, pending completion of the state court proceedings, will result in substantial "economic waste."

Moreover, denial of immediate review of *Orion II* will result in "delayed justice" by depriving Orion of its constitutional property rights until completion of the state court proceedings. The Washington Court has made a final determination that the public has the right to use Orion's property. Without immediate review, this unconstitutional invasion of Orion's property under the public trust decision and by the Sanctuary will continue for the entire duration of the additional state proceedings. To prevent this unnecessary delay of justice, *Orion II* must be deemed a final decision subject to immediate review by this Court. *See National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43 (1977) (Illinois Supreme Court's denial of a stay of an injunction, pending appeal on the merits, was deemed final for purposes of review by this Court because it could deprive petitioners of first amendment rights during the period of appellate review).

3. RIPENESS FOR REVIEW.

The State has argued, based on *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), that the State Court's decisions in *Orion II* are not ripe for review because Orion has not been denied just compensation for the taking of its property. In *Williamson*, however, this Court determined that the State had provided the petitioner with an adequate procedure for seeking just compensation for the alleged regulatory taking of its property. *Id.* at 194-97.

In the case at bar, in contrast, Orion does not have an adequate state procedure for seeking just compensation for the taking of its property. The State Court has already finally decided that the public trust doctrine applies retroactively to Orion's property and that no taking by invasion has occurred. Therefore, even if a regulatory taking is found, any award of compensation will not include the value of the expansive easement taken by the public trust decision. Hence, Orion cannot obtain just compensation for the taking of its property unless and until this Court reviews and reverses the State Court's decisions on the issues of public trust and taking by invasion. Accordingly, these decisions are ripe for review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari.

Respectfully submitted,

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